DEPARTMENT OF STATE REVENUE

04-20160712.LOF
04-20160713.LOF

Letter of Findings Numbers: 04-20160712 & 04-20160713
Sales/Use Tax
For The 2013, 2014, and 2015 Tax Years

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Indiana Car Dealership demonstrated that it was not responsible for sales tax on several vehicles because it documented that it physically delivered the vehicles to out-of-state locations. Indiana sales were taxed under Indiana tax law not the law of other states and thus Dealership was liable for the Indiana sales tax on the trucks it sold to Kentucky customers. Dealership was liable for use tax on its use of 18 vehicles.

ISSUES

I. Sales Tax - Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-2-3; IC § 6-2.5-4-1; IC § 6-2.5-5-24; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-2.5-13-1; IC § 6-8.1-3-12; IC § 6-8.1-5-1; IC § 6-8.1-5-4; *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc*., 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue,* 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Miller Brewing Co. v. Indiana Dep't of State Revenue*, 903 N.E.2d 64 (Ind. 2009); *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *United States v. McFerrin*, 570 F.3d 672 (5th Cir. 2009); *Stinson Estate v. United States*, 214 F.3d 846 (7th Cir. 2000); *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); 45 IAC 2.2-2-1; 45 IAC 2.2-4-1; 45 IAC 2.2-5-53; 45 IAC 2.2-5-54; Sales Tax Information Bulletin 28S (April 2012); Sales Tax Information Bulletin 84 (August 2014).

Taxpayer protests the assessment of sales tax.

II. Use Tax - Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-2.5-5-8; IC § 6-8.1-5-1; *Rhoade v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); *USAir, Inc. v. Indiana Dep't of State Revenue*, 623 N.E.2d 466 (Ind. Tax Ct. 1993); *Monarch Beverage Co. Inc. v. Indiana Dep't of State Revenue*, 589 N.E.2d 1209 (Ind. Tax Ct. 1992); *Hyatt Corp. v. Dep't of State Revenue*, 695 N.E.2d 1051 (Ind. Tax Ct. 1998); *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); 45 IAC 2.2-3-4; 45 IAC 2.2-3-15.

Taxpayer protests the assessment of use tax on 18 vehicles which it used and depreciated as its "capital assets."

STATEMENT OF FACTS

Taxpayer is an Indiana S Corporation and a licensed motor vehicle dealership. Taxpayer operates two locations in Indiana and is in the business of selling new and used cars as well as trucks. Taxpayer occasionally delivers vehicles to its customers' residences or business locations. Taxpayer's customers include individuals and companies from states other than Indiana. In addition to routine maintenance services and repairs, Taxpayer also offers its customers wrecker service.

In 2016, the Indiana Department of Revenue ("Department") audited Taxpayer's business records and tax returns for the tax years 2013, 2014, and 2015 ("Tax Years at Issue"). Both Taxpayer and the Department agreed to

utilize statistical sampling methods to project the audit results respectively for Indiana sales and use tax purposes.

Pursuant to the audit, the Department determined that Taxpayer sold several vehicles to its customers, but it failed to collect sales tax on the transactions which were subject to Indiana sales tax. In addition, the audit found that Taxpayer used some of its cars, which were part of its inventory, to facilitate its business without paying sales tax or self-assessing use tax. Nonetheless, the audit found that Taxpayer had overpaid some taxes. The audit credited Taxpayer its overpayment and assessed Taxpayer additional sales tax, use tax, penalty, and interest.

Taxpayer protested the assessment based on various reasons. An administrative hearing was held. This Letter of Findings results. Further facts will be provided as necessary.

I. Sales Tax - Imposition.

DISCUSSION

During the audit, the Department used a block sample and a projection method to determine the amount of the sales tax with respect to Taxpayer's sales of vehicles for the Tax Years at Issue. From the selected transactions for which documentation was determined inadequate, the Department sent letters to the purchasers asking them to verify the location of delivery. The audit then, based on the responses and nonresponses, determined the error rates, in turn, to project the amount of the sales tax which should have been collected for the Tax Years at Issue. The audit concluded that Taxpayer sold cars and trucks to customers without properly collecting Indiana sales tax or documenting the out-of-state delivery to support that these sales were exempted from Indiana sales tax. The audit assessed additional sales tax as a result.

Taxpayer objected to the audit's methodology and proposed assessments. Taxpayer agreed that it was liable for some, but not all, additional sales tax on its vehicle sales. Specifically, Taxpayer stated that it sold and delivered the cars or trucks to some customers at locations outside of Indiana. Taxpayer maintained that these sales were exempt from Indiana sales tax because the sales qualified for the interstate commerce exemption. In addition, Taxpayer asserted that some of its customers were Kentucky residents who purchased the trucks to be titled, registered, and used in Kentucky, that these trucks weighed 44,001 pounds or more, and that the sales of those trucks qualified for the exemption under the Kentucky statute, KRS § 138.470(16).

Indiana mandates that every person who is subject to a listed Indiana tax must keep books and records, including all source documents, "so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4(a). "The [D]epartment may audit any returns with respect to the listed taxes using statistical sampling." IC § 6-8.1-3-12(b). "If the taxpayer and the [D]epartment agree to a sampling method to be used, the sampling method is binding on the taxpayer and the department in determining the total amount of additional tax due . . . ." *Id*. In addition, "[i]f the [D]epartment reasonably believes that a person has not reported the proper amount of tax due, the [D]epartment shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the [D]epartment." IC § 6-8.1-5-1(a). All tax assessments are *prima facie* evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue,* 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc*., 963 N.E.2d 463, 466 (Ind. 2012). "Each assessment and each tax year stands alone." *Miller Brewing Co. v. Indiana Dep't of State Revenue*, 903 N.E.2d 64, 69 (Ind. 2009). The taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). Also, "all statutes are presumptively constitutional." *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 587 (Ind. 2014) (*citing UACC Midwest, Inc. v. Indiana Dep't of State Rev.* 629 N.E.2d 1295, 1299 (Ind. Tax Ct. 1994)). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Caterpillar, Inc.*, 15 N.E.3d at 583.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a); 45 IAC 2.2-2-1. A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2(a). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). A person who acquires tangible person property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). The purchaser in general "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." *Id*. "The retail merchant shall

collect the tax as agent for the state." *Id*.

When a purchaser claims the purchase "is exempt from the state gross retail [] tax[], the purchaser may issue an exemption certificate to the seller instead of paying the tax." IC § 6-2.5-8-8(a). The "seller accepting a proper exemption certificate under [IC § 6-2.5-8-8] has no duty to collect or remit the state gross retail [] tax on that purchase." *Id*. Otherwise, as an agent for the State of Indiana, the seller "holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3.

In addition, exemptions "are a matter of legislative grace" and "are only allowed as clearly provided for by statute, and are narrowly construed." *United States v. McFerrin*, 570 F.3d 672, 675 (5th Cir. 2009) (citing *Stinson Estate v. United States*, 214 F.3d 846, 848 (7th Cir. 2000)). That is, a statute which provides a tax exemption is strictly construed against the taxpayer. *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id*. at 101 (internal citations omitted). In applying any tax exemption, "[t]he general rule is that tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

Taxpayer in this protest claimed that the audit assessment is overstated based on various reasons. This Letter of Findings addresses these reasons in turn as follows:

A. Sales of Vehicles to Out-of-State Customers

During the audit, pursuant to the projection agreement, the Department sent questionnaires to selected out-of-state customers of Taxpayer inquiring as to the delivery location of the vehicles sold. The Department did so because Taxpayer had not collected Indiana sales taxes on the retail transactions, and Taxpayer did not present exemption certificates on those transactions. Based on those customers' responses and nonresponses together with records of Taxpayer, the audit found that some sales were Indiana transactions subject to Indiana sales tax. The audit calculated the error rates and, in turn, proceeded to assess additional sales tax.

Taxpayer claimed that those vehicles at issue were exempt from Indiana sales tax because those vehicles were sold to out-of-state purchasers and were delivered to customers outside of Indiana. Taxpayer maintained that the assessment is overstated.

Sales of vehicles in Indiana generally are subject to Indiana sales tax unless the transactions are specifically exempted under Indiana law. One particular exemption relevant to this present case is a retail transaction that qualifies as interstate commerce. IC § 6-2.5-5-24(b); *See also* 45 IAC 2.2-5-53; 45 IAC 2.2-5-54. Specifically, 45 IAC 2.2-5-54(b), in relevant part, provides that:

> Sales of tangible personal property which are delivered to the purchaser in a state other than Indiana for use in a state other than Indiana are not subject to gross retail tax or use tax, provided the property is not intended to be subsequently used in Indiana.

The Department's Sales Tax Information Bulletin 28S (April 2012), 20120530 Ind. Reg. 045120259NRA ("Information Bulletin 28S"), addresses issues concerning sales of motor vehicles which applies to the Tax Years at Issue. The Information Bulletin 28S further explains, in relevant part, as follows:

> **IV. INTERSTATE COMMERCE EXEMPTION**
>
> A vehicle . . . sold in interstate commerce is not subject to the Indiana sales tax. ***To qualify as being "sold in interstate commerce," the vehicle . . . must be physically delivered, by the selling dealer to a delivery point outside Indiana***. The delivery may be made by the dealer, or the dealer may hire a third-party carrier. ***Terms and the method of delivery must be indicated on the sales invoice. The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale***. The exemption does not apply to sales to out-of-state buyers in which the buyer takes physical possession of a vehicle or trailer in Indiana, nor is the exemption valid if the buyer, and not the seller, hires a third-party carrier to transport the vehicle or trailer outside Indiana. If the buyer hires the carrier, the carrier is acting as an agent for the buyer; thus, the buyer takes physical possession within Indiana. Possession taken within the state does not qualify as an interstate sale. (**Emphasis in original)(*Emphasis added***).

Thus, a licensed Indiana car dealer generally must either collect sales tax or a sales tax exemption certificate at the time of the car sale. To qualify for the interstate commerce exemption, the dealer must document the terms and the method of delivery on the sales invoice and maintain copies of delivery documents to substantiate that the vehicles are sold in interstate commerce. Otherwise, the dealer will be responsible for the Indiana sales tax.

During the audit, the Department determined that Taxpayer's records were inadequate to establish that some of its vehicle sales qualified for the interstate commence exemption. In relevant part, the audit noted:

> A review of the vehicle sales revealed sales on which no Indiana sales tax was collected. Most of these sales indicated that the customer took delivery outside of Indiana. Two customers were determined to have arranged with a third party to have the vehicles delivered to them. Sales on which the property purchased is delivered to the purchaser (or purchaser's representative) in Indiana do not qualify for the interstate commence exemption per 45 IAC 2.2-5-54 and Information Bulletin 28S.

Additionally, the audit noted that "letters were mailed to non-Indiana customers on whom no sales tax was collected" and that the Department received responses from over 70 percent of these customers in question. Among the customers who responded, some responses established that the vehicles were "picked up or delivered in Indiana" and therefore were deemed Indiana sales subject to Indiana sales tax. The Department removed several of those deemed Indiana sales from its adjustments after Taxpayer provided additional documents, including "payment to drivers" and "employee expense reports," to support that the vehicles were delivered to its customers at locations outside of Indiana.

Throughout the protest, Taxpayer reiterated that the Department's assessment is not correct. Taxpayer maintained that the audit methodology was not valid; as was the error rate, which was used to determine the amount of the additional sales tax on the vehicle sales regarding its out-of-state customers. Taxpayer stated that it had contacted these out-of-state customers and found that some customers did not understand the communication while others misunderstood the Department's letter of inquiry. Thus, Taxpayer asserted that the audit erred in relying on the out-of-state customers' responses and non-responses to the Department's letter of inquiry, and, in turn, to arrive at the erroneous assessment. Taxpayer thus maintained that it was not responsible for the additional Indiana sales tax because those sales qualified for the interstate commerce exemption. To support its protest, in addition to affidavits of the out-of-state customers in question, Taxpayer offered similar questionnaire of its own, which were sent to the same out-of-state customers after the audit. Taxpayer asked the Department to review those documents, which could have revised the previous responses received.

Upon review, first, the Department is not able to agree with Taxpayer that the audit methodology was invalid. As mentioned earlier, the Department is authorized to audit Taxpayer's records. When the Department reasonably believes that Taxpayer failed to properly collect and report the sales tax, the Department is also authorized to use the best information available at the time of the audit. Rather than examining records of every transaction, the audit methodology utilized a block sample and reviewed records of those selected transactions. Only when the records failed to support nontaxable transactions, did the Department inquire further by sending the questionnaire to the customers in question or request Taxpayer to provide other verifiable supporting documents within a period of time. Upon verifying those supporting documents, the audit recalculated the error rate and revised the audit result. The selected transactions were representative and the method was reasonable. Taxpayer was in a better position to offer alternative methods during the audit because it knows its business best and possesses its records. But Taxpayer did not do that. Without additional supporting documents to demonstrate otherwise, the Department is unable to agree that the methodology is not valid.

Second, Taxpayer asserted that the audit's error rates were overstated. In addition to its sales records, Taxpayer provided additional supporting documentation, including various properly executed and notarized Affidavits (in lieu of Testimony) to support that some customers misunderstood the Department's questionnaire and that Taxpayer delivered the vehicles to customers' out-of-state locations. Considering the totality of the circumstances and the additional documents, the Department is prepared to agree that Taxpayer met its burden of demonstrating that it was not responsible for the following transactions because these transactions qualified for the interstate commence exemption:

Date	Purchasers	Item	VIN
6/11/13	B[] K[]	2005 Internation 8600	1HSHXSBR75J190958
8/30/13	T[] O[]	2005 Freightline Columbia	1FUJA6DE45LU49352
12/30/13	A[] Ent[]	2005 Freightline Columbia	1FUJA6CK05LV15628
8/19/14	J[] K[]	2014 Jet Trailer	5JNGS3624EH001145

1/15/15	N[] T[]	2013 Jet [T]railer	5JNGS3823DH000984
9/14/15	G[] Farms LLC	2011 Internation Prostar	3HSCUAPR3BN265363
9/26/13	A[] A[]	2014 Ford Explorer	1FM5K8GT1EGA68476

Nonetheless, the Department is not able to agree that Taxpayer met its burden of demonstrating that it was not responsible for the remaining transactions. Without other verifiable documents, the vehicles at issue are presumed to be sold and accepted at the dealership's Indiana location during the tax years at issue. When the purchasers accepted the vehicles at the dealership's business location in Indiana, the sales of the vehicles were Indiana transactions and subject to Indiana sales tax pursuant to the above-mentioned statutes, regulations, and case law. In the absence of other verifiable supporting documentation to demonstrate otherwise, the audit properly assessed Taxpayer additional tax because Taxpayer is responsible for the sales tax under IC § 6-2.5-9-3.

B. Sales of Trucks Weighing 44,001 pounds or Greater to Kentucky Purchasers

Alternatively, Taxpayer asserted (1) that some of its customers who picked up the trucks in Indiana were Kentucky residents (2) that those customers who purchased the trucks titled, registered, and used the trucks in Kentucky, (3) that those trucks weighed 44,001 pounds or more, and (4) that those trucks qualified for the tax exemption under the Kentucky statute, KRS § 138.470(16). Taxpayer thus claimed that it was not responsible for the Indiana sales tax under that Kentucky exemption pursuant to IC § 6-2.5-2-3.

In 2014, the Indiana General Assembly enacted legislation, 2014 Ind. Acts 1983, P.L. 166-2014, § 9 (codified at IC § 6-2.5-2-3), offering deferential treatment on certain qualified Indiana sales of motor vehicles which occurred after June 30, 2014. IC § 6-2.5-2-3 states, as follows:

> (a) As used in this section, "motor vehicle" means a vehicle that would be subject to the vehicle excise tax imposed under IC 6-6-5 if the vehicle were to be used in Indiana.
>
> (b) Notwithstanding section 2 of this chapter, **the state gross retail tax rate on a motor vehicle that a purchaser intends to**:
>
> **(1) transport to a destination outside Indiana within thirty (30) days after delivery; and**
> **(2) title or register for use in another state or country**;
>
> **is the rate of that state or country** (excluding any locally imposed tax rates) as certified by the seller and purchaser in an affidavit satisfying the requirements of subsection (c).
>
> (c) The department of state revenue shall prescribe the form of the affidavit required by subsection (b). In addition to the certification required by subsection (b), the affidavit must include the following:
> (1) The name of the state or country in which the motor vehicle will be titled or registered.
> (2) An affirmation by the purchaser under the penalties for perjury that the information contained in the affidavit is true.
> (3) Any other information required by the department of state revenue for the purpose of verifying the information contained in the affidavit.
>
> (d) The department may audit affidavits submitted under this section and make a proposed assessment of the amount of unpaid tax due with respect to any incorrect information submitted in an affidavit required by this section.
>
> (**Emphasis added**).

Specifically, IC § 6-2.5-2-3 allows purchasers who purchase qualified motor vehicles in Indiana but intend to title and register the vehicles to be used in states other than Indiana (within 30 days after the sale) to pay the tax rate of the state for which the vehicles are ultimately titled, registered, and used. The Department's Sales Tax Information Bulletin 84 (August 2014), 20140827 Ind. Reg. 045140329NRA ("Information Bulletin 84") further explains the computation of the sales tax concerning the qualified Indiana sales.

> **INTRODUCTION**
> As a general matter, the sales tax rate imposed on all retail transactions in Indiana is [seven (7) percent]. However, the General Assembly has enacted legislation (SEA 0367-2014) specifically directed toward the sales of vehicles to individuals or entities that intend to title and register the vehicle for use in another state or

country. Effective July 1, 2014, the sales tax rate imposed on such sales is the state-level sales tax rate of the state in which the vehicle will be titled and/or registered.

DEFINITIONS
The term "motor vehicle" means a vehicle that would be subject to the annual license excise tax imposed under IC 6-6-5 if the vehicle were to be used in Indiana. This includes cars, motorcycles, and trucks weighing 11,000 pounds or less. ***This does not include*** motor homes; ***trucks weighing greater than 11,000 pounds; or trailers***.

DETERMINATION OF THE TAX RATE
Beginning on July 1, 2014, when the purchaser of a motor vehicle intends to both (a) transport that motor vehicle to a destination outside Indiana within 30 days after delivery, and (b) title and register that motor vehicle for use in another state or country, the rate at which sales tax is to be imposed and collected on the sale is the rate of the intended destination state or country.

The sales tax rates of the other states are inclusive of only state-level rates. Any locally imposed sales tax rates in the other states are not included in the rates Indiana dealers will be required to collect. Additionally, the statutory language of IC [§] 6-2.5-2-3 requires the application of the destination state's state-level sales tax rate only to the sale of a motor vehicle that is to be titled and registered for use in another state. Accordingly, the destination state's sales tax rate is the only aspect of that state's laws that will be incorporated by virtue of IC [§] 6-2.5-2-3. The statute does not require the incorporation of other aspects of a state's laws relating to transactions involving vehicles.
. . .
An Indiana dealer will only be required to collect sales tax at the destination state's rate up to Indiana's rate of [seven (7) percent]. Regardless of whether the destination state's or country's rate is greater than [seven (7) percent], the maximum sales tax rate to be imposed on the purchase of a vehicle from an Indiana dealer is [seven (7) percent].

If the destination state does not impose a sales tax, either in general or on purchases of vehicles, then no sales tax is to be collected by the Indiana dealership.

- **Example []2**: Customer, who is a resident of Montana, comes into Indiana to buy a motor vehicle from a dealership in Indiana. Customer intends to title and register the vehicle for use in Montana. Currently, Montana does not impose any sales tax. As such, the Indiana dealership would not have to charge Customer any sales tax on the purchase of the motor vehicle (though Customer and the dealership would still have to fill out the ST-108NR).

. . .
Lastly, these statutes and the administration thereof apply only to transactions that are sourced to Indiana pursuant to IC [§] 6-2.5-13 *et seq*. More to the point, these statutes apply only to intrastate transactions in which the customer actually receives the vehicle here in Indiana. ***Nothing about this statutory regime impacts transactions that are in interstate commerce***.

(**Emphasis in original**)(***Emphasis added***).

Throughout its protest, Taxpayer stated, in relevant part:

> The Department's proposed assessment is incorrect because the audit did not take into consideration a Kentucky statute that exempts from sales tax vehicles weighing 44,001 pounds or greater. Consequently, Ind. Code § 6-2.5-2-3 exempts several additional transactions . . . .

Taxpayer further offered several signed exemption certificates to support its contention.

Upon review, however, Taxpayer is mistaken. As discussed earlier, exemptions are matters of legislative grace. Exemptions are "only allowed as clearly provided for by statute, and are narrowly construed." *McFerrin*, 570 F.3d at 675; *Stinson Estate*, 214 F.3d at 848. In this instance, IC § 6-2.5-2-3(b) specifically states "the state gross retail **tax rate** on a motor vehicle that a purchaser intends to: (1) transport to a destination outside Indiana within thirty (30) days after delivery; and (2) title or register for use in another state . . . **is the rate of that state** . . . ." (**Emphasis added**). The statutory language of IC § 6-2.5-2-3(b) is plain and clear; the Indiana legislators intended to apply "the tax rate of that state" on qualified motor vehicles and "the tax rate of that state" only. While applicable Indiana exemptions outlined under IC 6-2.5-5 remain available to out-of-state purchasers, the Indiana legislators did not offer the out-of-state purchasers any statutory exemptions provided by their home states. In

other words, Indiana is not precluded from taxing Indiana sales at the Indiana rate. Whether State of Kentucky exempts its resident-purchasers from Kentucky sales tax is beyond the scope of this protest. Without the statutory authority, the Department must decline Taxpayer's invitation.

Further, IC § 6-2.5-2-3 does not apply to "trucks weighing greater than 11,000 pounds [] or trailers." When sales of "trucks weighing greater than 11,000 pounds [] or trailers" are sourced to Indiana subject to Indiana sales tax, the retail merchant must collect Indiana sales tax at seven (7) percent rate, not the tax rates of the out-of-state purchasers' states. In this instance, Taxpayer did not dispute that the sales of trucks at issue were accepted in Indiana by its customers; rather it contended that the customers were Kentucky residents who titled, registered, and used the trucks in Kentucky and the trucks qualified for the Kentucky exemption. Thus, Taxpayer was required to collect the Indiana sales tax at seven (7) percent regardless of the purchasers were Kentucky residents who intended to register, title, and use the trucks and trailers in question in the State of Kentucky.

In short, pursuant to IC § 6-2.5-2-3 and Information Bulletin 84, the Kentucky exemption does not apply and also the Kentucky tax rate does not apply to the truck sales at issue. These transactions in question began and concluded in Indiana when Taxpayer's Kentucky customers took possession of the trucks they purchased in Indiana. In other words, these trucks were not sold in interstate commerce because Taxpayer did not deliver the trucks outside Indiana. Taxpayer delivered the trucks at its Indiana business location and its out-of-state customers accepted the trucks in Indiana. The sales of the trucks in question were Indiana sales subject to Indiana sales tax. IC § 6-2.5-13-1(d)(1). Since these trucks were not qualified for the preferential Kentucky tax rate and the Kentucky customers were not entitled to any exemption pursuant to Indiana law, Taxpayer, as an agent for the state, was required to collect the Indiana sales tax at the time of the sales.

FINDING

Taxpayer's protest of the imposition of sales tax is sustained in part and respectfully denied in part. The Department's Enforcement Division is requested to conduct a supplemental audit review to make the necessary adjustments and recalculate Taxpayer's tax liability. This determination is not final until the supplemental audit review is concluded and its companion supplemental report is issued.

II. Use Tax - Imposition.

DISCUSSION

The audit assessed additional use tax on the full value of eighteen (18) vehicles, which were depreciated, as capital assets, in Taxpayer's depreciation schedule without paying sales tax or use tax. In relevant part, the Department's audit noted:

> A review of the taxpayer's capital assets has been completed for the years covered by this audit. This review revealed that vehicles were being removed from inventory, capitalized and depreciated. These service vehicles are being used by the taxpayer's employer's employees and by their customers. Customers receive use of a courtesy vehicle while their vehicle is being repaired and/or serviced when requested or deemed necessary by the parties involved. Since the taxpayer has capitalized these vehicles and has taken depreciation on them use tax is being assessed on the value as shown on the depreciation schedule. Credit has been allowed for use tax paid on these vehicles based on miles driven.

The audit determined that Taxpayer purchased those vehicles without paying sales tax and subsequently used them during the course of its business. The audit thus determined that Taxpayer was responsible for the use tax on the full value of the vehicles. The audit found that Taxpayer was not in the business of leasing or renting the vehicles to its customers. The audit also declined to consider a credit - equivalent to "trade-in" value of the vehicle - when these vehicles were subsequently placed back into inventory. The audit explained that "there is no retail transaction being completed between two parties when the cars are placed back into inventory."

Taxpayer disagreed, claiming that it was not responsible for the additional use tax "because the property was not acquired in a retail sale." Alternatively, Taxpayer suggested "perhaps a compromise would be to assess use tax based upon the dollar value of the depreciation amount of the unit while it is in loaner service as that is what is actually 'used' or 'consumed' in the course of the taxpayer's business . . . ." As discussed in Issue I, Taxpayer bears the burden to demonstrate that the Department's proposed assessment of the use tax is incorrect. IC § 6-8.1-5-1(c).

In addition to a sales tax, Indiana also imposes a complementary excise tax called "the use tax" on "the storage,

use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). A "retail transaction" is "a transaction of a retail merchant that constitutes selling at retail as described in IC [§] 6-2.5-4-1, that constitutes making a wholesale sale as described in IC [§] 6-2.5-4-2, or that is described in any other section of IC 6-2.5-4." IC § 6-2.5-1-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. *See Rhoade v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. *Rhoade*, 774 N.E.2d at 1048; *USAir, Inc. v. Indiana Dep't of State Revenue*, 623 N.E.2d 466, 468 - 69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. *Rhoade*, 774 N.E.2d at 1047 - 50 (explaining that, generally, states impose a use tax to prevent the erosion of the state's tax base when its residents make purchases in other states). To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. IC § 6-2.5-3-2(a); *USAir, Inc.*, 623 N.E.2d at 468. A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. *See* IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a). "The use tax is also imposed on the storage, use, or consumption of a vehicle . . . if the vehicle . . . (1) is acquired in a transaction that is an isolated or occasional sale; and (2) is required to be titled, licensed, or registered by this state for use in Indiana." IC § 6-2.5-3-2(b).

An exemption from the use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4 and 45 IAC 2.2-3-4. There are various tax exemptions available outlined in IC § 6-2.5-5. The legislature enacted the statutory exemptions, such as IC § 6-2.5-5-8, "to mitigate the effect of tax pyramiding." *Hyatt Corp. v. Dep't of State Revenue*, 695 N.E.2d 1051, 1056 (Ind. Tax Ct. 1998). "Tax pyramiding occurs in the sales and use tax context where a tax is levied upon a tax." *Id*. As discussed in Issue I, a statute which provides a tax exemption, however, is strictly construed against the taxpayer. *RCA Corp.*, 310 N.E.2d at 97. "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id*. at 101 (internal citations omitted). In applying any tax exemption, "[t]he general rule is that tax exemptions are strictly construed in favor of taxation and against the exemption." *Kimball Int'l Inc.*, 520 N.E.2d at 456.

45 IAC 2.2-3-15 further explains:

> If any person who issues an exemption certificate in respect to the state gross retail tax or use tax and thereafter makes any use of the tangible personal property covered by such certificate, or in any way consumes, stores, or sells such tangible personal property, where such use, consumption, storage or sale is in a manner which is not permitted by such exemption, such use, consumption, or storage shall become subject to the use tax (or such sale shall become subject to the gross retail tax), and such person shall become liable for the tax or gross retail tax due thereon.

Taxpayer in this instance initially purchased the 18 vehicles for resale. The vehicles were Taxpayer's inventory. Taxpayer subsequently withdrew these 18 vehicles from its inventory and used them to facilitate its business. Taxpayer argued that it was not responsible for the use tax "because the property was not acquired in a retail sale." Taxpayer stated, in part:

> Although they are required to be titled for use in a loaner vehicle program the ownership does not change from the certificate of origin; the ownership remaining with the dealership. Ultimately, after the vehicles are utilized for a relatively short period of time, the vehicles, by book entry, are placed back in inventory and sold to an ultimate consumer who pays the sales tax on a retail transaction and the tax is remitted to the State of Indiana. In short, these "dealer transfers" are simply journal entries. The units are depreciated in value while in the loaner fleet because they diminish in value when used by service customers. The auditor has proposed to assess use tax on the entire value of the vehicle based upon the various journal entries.

Upon review, however, the Department disagrees. Taxpayer's documents showed that it initially purchased the 18 vehicles from the original manufacturers, the retail merchants, without paying sales tax pursuant to IC § 6-2.5-5-8. *See Monarch Beverage Co. Inc. v. Indiana Dep't of State Revenue*, 589 N.E.2d 1209, 1212 (Ind. Tax Ct. 1992) (explaining that the manufacturer was a retail merchant making retail transactions). Therefore, the vehicles at issue were acquired in retail transactions.

Taxpayer, in its books and records, reclassified the vehicles from inventory items held for sale to "capital assets" and depreciated the vehicles in its depreciation schedule when Taxpayer subsequently removed the vehicles from its inventory and used them. Thus, Taxpayer's subsequent use of the vehicles was subject to Indiana use tax pursuant to IC § 6-2.5-3-2 and 45 IAC 2.2-3-15. *See also Monarch Beverage*, 589 N.E.2d at 1214. ("Sales and use taxes are transactional taxes imposed on the gross income received from a retail transaction. Therefore, sales or use tax can be collected more than once on the same item if the item is the subject of more than one non-exempt retail transaction.") The audit thus properly found that Taxpayer was responsible for additional use tax because Taxpayer did not pay use tax on the use of the vehicles, Taxpayer's use did not qualify for any statutory exemption, and no sales tax was paid when it acquired the vehicles.

In short, Taxpayer withdrew the vehicles from its inventory, used the vehicles to conduct its business, and depreciated these vehicles. Because its use did not qualify for any statutory exemption, Taxpayer was responsible for the use tax on its use of the 18 vehicles.

FINDING

Taxpayer's protest of the imposition of use tax is respectfully denied.

SUMMARY

Taxpayer's protest of Issue I is sustained in part and denied in part subject to supplemental audit review. Taxpayer's protest of Issue II is respectfully denied. This determination is not final until the supplemental audit review is concluded and its companion supplemental report is issued.

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